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No. 06-562

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT ATLANTIC RESEARCH CORPORATION

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QUESTIONS PRESENTED

1. Whether a party that is potentially responsible for the cost of cleaning up property contaminated with hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may bring an action against another potentially responsible party for cost recovery under Section 107(a), 42 U.S.C. 9607(a).

2. In the alternative, if the aforementioned potentially responsible party has no express cause of action under Section 107(a) to recover a portion of the response costs incurred, whether the party has an implied right to contribution afforded by Section 107(a).

RULE 29.6 STATEMENT

There is no parent corporation or any publicly held corporation that owns 10% or more of Respondent's stock.

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INTRODUCTION

The issue in this case is whether, under CERCLA, § 107(a)(4)(B), 42 U.S.C. 9607(a)(4)(B), a company that is potentially responsible for cleaning up a contaminated site or paying for a cleanup, a so-called "PRP," and that does so *voluntarily*, may recover an equitable share of its costs from other PRPs. A voluntary cleanup occurs where there is no order, judgment or settlement compelling the PRP to clean up a site, nor is there any pending civil action seeking to compel such a cleanup.

If partial cost recovery is denied to PRPs that voluntarily clean up contaminated sites, not only would respondent Atlantic Research Corporation ("ARC") be unfairly forced to absorb substantial cleanup costs which, in large part, are attributable to activities of the Department of Defense, but other PRPs will forego voluntary cleanups altogether. Also, if partial cost recovery is unavailable, the government will be substantially insulated from having to shoulder its share of responsibility for contaminating numerous sites throughout the country, despite having waived its sovereign immunity. These results would undermine CERCLA's twin goals of promoting prompt, voluntary remediation of hazardous waste sites, and requiring PRPs, such as the Department of Defense, to assume their fair share of cleanup costs.

ARC submits that PRPs that voluntarily clean up contaminated sites have *always* been entitled to recover an equitable share of their response costs from other PRPs. In the period dating from CERCLA's enactment in 1980 until passage of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 ("SARA"), courts unanimously held that § 107(a)(4)(B) expressly provided PRPs that voluntarily

clean up sites with the right to obtain partial cost recovery from other PRPs. The *only* issue prior to SARA was whether a PRP that was *compelled* to clean up a site, or to pay for site cleanup, had a right to contribution under CERCLA – a right not expressly provided by the Act. These pre-SARA courts concluded that a right to contribution could be implied from the Act or existed as a matter of federal common law.

SARA was enacted in 1986 to confirm and codify this right to contribution. SARA did not purport to even address, much less modify, curtail or withdraw, the well-established and separate right of partial cost recovery afforded by § 107(a)(4)(B) to PRPs that voluntarily cleaned up contaminated sites. Indeed, no contribution issue was involved in those cleanups because they were not performed under compulsion, nor were the PRPs voluntarily performing them jointly liable with any other PRP, both necessary elements of contribution.

Although many post-SARA appellate courts concluded that partial cost recovery claims by PRPs that voluntarily cleaned up sites were actually contribution claims to be brought under § 113(f), the reason courts did so was their mistaken view that *all* claims for partial cost recovery could and should be maintained as § 113(f) actions, and that § 107(a)(4)(B) claims necessarily resulted in joint and several liability for indemnity – a remedy reserved for non-PRPs.

In *Cooper Indus. Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), this Court corrected the first of the above misconceptions, holding that § 113(f) does not permit *all* PRPs to seek partial cost recovery – but only those that have been sued in a § 106 or § 107(a) civil action, or those PRPs that have resolved their CERCLA liability by

settlement with the United States or a State. This case presents the Court with the occasion to correct the second misconception embraced by many post-SARA courts – that § 107(a)(4)(B) is not a source of partial cost recovery for PRPs that voluntarily clean up a contaminated site, but is reserved exclusively for non-PRPs that are entitled to recover indemnity from PRPs on a joint and several liability basis. Indeed, the Second, Seventh and Eighth Circuits have now repudiated those erroneous post-SARA, pre-*Aviall* decisions, correctly holding that PRPs voluntarily cleaning up contaminated sites have a viable § 107(a)(4)(B) claim for partial cost recovery.

SUMMARY OF ARGUMENT

CERCLA liability is governed by § 107(a)(4), providing that a "covered person" – a "PRP," "*shall be liable for* (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary *costs of response incurred by any other person* consistent with the national contingency plan; . . . ." (emphasis added). What this means is that a PRP cannot be *liable* to another for a claim under CERCLA unless and until: (1) a governmental entity incurs "costs of removal or remedial action" at a particular site, or (2) a private party incurs "costs of response" at a given site.[1]

---

[1] "Response costs" include all costs associated with "removal of hazardous substances" and "remedial action," §§ 101(23) and (24), and also include all "enforcement activities related thereto." Section 101(25). Of course, "response costs" may be incurred by a PRP that would not render any other PRP "liable," *i.e.*, if there were a viable defense to liability under § 107(b), or if the response costs incurred were unnecessary or inconsistent with the national contingency plan.

(Continued on following page)

For ease of reference, where no response costs have been incurred by any person other than a given PRP that has voluntarily incurred them – *i.e.*, not under the compulsion of any order, judgment or settlement, or a civil action seeking to compel a cleanup, the PRP will be referred to herein as a "voluntary remediator." Conversely, where a PRP has been compelled to clean up a site or to pay for a cleanup, either by order, judgment or settlement, the PRP will be referred to as a "compelled remediator." In the present case, ARC is a "voluntary remediator."

The government claims that all PRPs are excluded from the term "any other person" in § 107(a)(4)(B), and thus must confine their partial cost recovery claims to contribution actions under § 113(f). Stated another way, the government contends that only "innocent parties," *i.e.*, non-PRPs, are included within the term "any other person" in § 107(a)(4)(B). Alternatively, the government argues that even if PRPs are "other persons" within § 107(a)(4)(B), § 113(f) still provides the *exclusive* source of cost recovery (contribution) to *all* PRPs, including both voluntary remediators and compelled remediators. The government insists that only "innocent parties" are entitled to seek response costs under § 107(a)(4)(B).

ARC will establish that *all* PRPs are included within the term "any other person" in § 107(a)(4)(B). The government's contrary claim: (1) makes no grammatical sense and has been rejected by *every* court interpreting and applying § 107(a)(4)(B); (2) is inconsistent with a parallel

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However, a necessary condition for the accrual of any cause of action asserting CERCLA liability under § 107(a) is the incurrence of response costs, including "an enforcement activity," by the party bringing the suit.

and complementary provision in CERCLA; (3) is contrary to the EPA's own interpretation of § 107(a)(4)(B); (4) would lead to unreasonable and unjust consequences; and (5) would conflict with the core principles underlying CERCLA.

ARC will also establish that the government's fall-back argument – that even if § 107(a)(4)(B) includes PRPs, voluntary remediators have no viable claim under that provision and must sue under § 113(f) – is equally flawed. First, the government ignores the critical difference between a *compelled remediator* that is liable under CERCLA for cleaning up a contaminated site, or paying for that cleanup, and a *voluntary remediator* that, although potentially responsible for site cleanup, is not actually liable under CERCLA for cleaning up a site, but does so despite the absence of any order, judgment or settlement compelling cleanup, and without any CERCLA civil action seeking to compel cleanup.[2]

Indeed, although the government now conveniently ignores this distinction, less than one year ago, in an *amicus curiae* brief filed in *Metropolitan Water Reclamation Dist. of Greater Chicago v. No. Amer. Galvanizing and Coating, Inc.*, 473 F.3d 824 (7th Cir. 2007), the government emphasized its importance in determining whether a party could proceed with a § 107(a)(4)(B) cost recovery claim:

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[2] This distinction between compelled remediators and voluntary remediators is significant for purposes of contribution, which requires, *inter alia*, *compelled payment* by one sharing a *joint or common liability* with another. *See, e.g., Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350-51 (6th Cir. 1998); *see also* § 113(f)(1), providing that cost allocation in CERCLA contribution actions occurs only "among *liable* parties. . . ." (emphasis added) Thus, compelled remediators may seek partial cost recovery under § 113(f), while voluntary remediators do not – the latter obtain partial cost recovery under § 107(a)(4)(B).

> Under [§ 107(a)(4)(B)], *persons who are not themselves liable* may cleanup contaminated property and then invoke [§ 107(a)(4)(B)] to seek reimbursement from the same four categories of PRPs that are subject to government cleanup or cost recovery actions.

(Gov't. *Amicus* Br., pp. 7, 10) (emphasis added). Because voluntary remediators such as ARC are not "liable" under CERCLA when they voluntarily undertake cleanups, even under the government's view of § 107(a)(4)(B), articulated in *Metropolitan Water*, they may invoke that provision "to seek reimbursement from the same ... PRPs that are subject to government cleanup or cost recovery actions."

Second, the government's objection to voluntary remediators recovering a portion of their response costs under § 107(a)(4)(B) is based upon a flawed premise – that cost recovery under this provision necessarily results in joint and several liability for indemnity only, a remedy reserved for non-PRPs. The government insists that because all voluntary remediators are still PRPs, they necessarily bear *some* responsibility for contamination at a given site, and thus may not impose joint and several liability for indemnity upon any other PRP. Instead, the government argues, partial cost recovery is the only available remedy to voluntary remediators, and that remedy is afforded *solely* by § 113(f).

The problem with the government's argument is that nothing in CERCLA *requires* joint and several liability for indemnity be imposed upon PRPs under § 107(a)(4)(B).[3] Rather, in cases such as this one, involving the United

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[3] This Court implicitly recognized this fact in *Aviall, supra*, 543 U.S. at 171, n.6: "We do not address whether a § 107 cost recovery action ... may seek some form of liability other than joint and several."

States as a PRP, § 107(a)(4)(B) permits a voluntary remediator to recover a *portion* of its costs, *i.e.*, to impose several liability only, just as in the contribution remedy provided by § 113(f). The liability of the United States in all such § 107(a)(4)(B) actions should be several only because it would be inappropriate to hold taxpayers jointly liable for the contamination caused by all other PRPs responsible for contaminating a site. ARC, a voluntary remediator, seeks to recover only its equitable share of response costs from the United States as a result of ARC's having voluntarily incurred first instance response costs at the Camden, Arkansas site. ARC's cost recovery action against the United States is authorized by § 107(a)(4)(B); ARC is not confined to a non-existent contribution claim under § 113(f), as the government claims.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF "ANY OTHER PERSON" IN § 107(a)(4)(B) IS INCONSISTENT WITH: (A) THE PLAIN MEANING OF THE PROVISION AND OVER 25 YEARS OF CERCLA JURISPRUDENCE; (B) A PARALLEL AND COMPLEMENTARY PROVISION IN CERCLA; (C) THE EPA'S OWN INTERPRETATION OF § 107(a)(4)(B); (D) A RATIONAL LIABILITY SCHEME UNDER CERCLA; AND (E) THE PRIMARY PURPOSES OF CERCLA.

A. The Plain Meaning Of The Phrase "Any Other Person" Is To Differentiate Between Governmental Entities And Non-Governmental Entities, Including PRPs.

Contrary to the government's claim that the word "other" in § 107(a)(4)(B) refers to, and thereby excludes, PRPs (Gov't. Br., pp. 11, 15), the purpose of the phrase

"any other person" is to differentiate the nature, scope and conditions of cost recovery by governmental entities under § 107(a)(4)(A), from the nature, scope and conditions of recovery by private entities under § 107(a)(4)(B). Not only do governmental entities recover *all* of their response costs, as opposed to *necessary* costs of response recoverable by non-governmental entities, but it is undisputed that, as the government has argued for years, the purpose of the phrase "not inconsistent with the national contingency plan" ("NCP") is to make clear that when governmental entities seek to recover response costs, it is presumed the costs incurred are consistent with the NCP, thereby imposing upon PRPs the burden of proving otherwise. Under § 107(a)(4)(B), however, private parties bear the burden of proving the costs incurred were consistent with the NCP. *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 579 F. Supp. 823, 850-51 (W.D. Mo. 1984); *United States v. Ward*, 618 F. Supp. 884, 899-900 (E.D.N.C. 1985); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1008-09 (D.S.C. 1984).

The government's interpretation of § 107(a)(4)(B) has been rejected repeatedly by courts considering the issue. In one of the earliest CERCLA cases, *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1141-42, (E.D. Pa. 1982), the City, a voluntary remediator, argued that defendants were liable for a portion of the City's necessary costs of response under § 107(a)(4)(B). The defendant PRPs contended, however, as the government argues here, "that the term 'any other person' as used in 42 U.S.C. § 9607(a)(4)(B) does not include a party which itself is subject to liability under the act." The district court rejected the argument, holding that although § 107(a)(4)(B)

was not "a model of clarity, the provision does not specifically exclude parties that may be liable . . . nor does its language support such a construction."

In the latest case addressing the government's claim, *Metropolitan Water*, *supra*, the Seventh Circuit also rejected the government's interpretation of § 107(a)(4)(B):

> Nothing in subsection (B) indicates that a potentially liable party . . . should not be considered 'any other person' for purposes of a right of action.
>
> Certainly, as the EPA points out, the word 'other' in that phrase should be given meaning as a distinguishing term. Yet, we disagree that the word 'other' distinguishes 'any other person' from the four categories of potentially responsible parties listed earlier in subsections (1) through (4) of § 107(a). Rather, we read 'other' as distinguishing 'any other person' from the 'United States Government,' a 'State' or an 'Indian tribe,' the parties listed in the immediately preceding subsection. *Id.* These parties, as subsection (A) states, may recover costs '*not inconsistent* with the national contingency plan.' *Id.* § 9607(a)(4)(A) (emphasis added). By contrast, 'any other person' is limited to recovery of those costs '*consistent* with the national contingency plan.' *Id.*, § 9607(a)(4)(B) (emphasis added). Thus, we read the two subsections, and the referenced 'any other person' simply as the statute's way of relaxing the burden of proof for governmental entities as opposed to private parties.

473 F.3d at 835. Indeed, in the 25 years between *Stepan* and *Metropolitan Water*, every court addressing the government's proffered interpretation of § 107(a)(4)(B) has

rejected it,[4] and every court interpreting § 107(a)(4)(B) has held that PRPs are among the "other persons" referenced in that provision.[5]

Despite these facts, the government makes two additional arguments to support its strained interpretation of § 107(a)(4)(B). First, the government claims that legislative history underlying § 107(a)(4)(B) indicates that PRPs are not included in the term "any other person." This is because an initial 1980 draft provision of § 107(a)(4)(B) read "any person," purportedly including PRPs, but was later changed to read "any other person,"

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[4] *See, e.g., Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 890-91 (9th Cir. 1986); *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348, 1357 n.11 (D. Del. 1985); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 617 (S.D.N.Y. 1986); *Chesapeake & Potomic Tel. Co. of Va. v. Peck Iron & Metal Co, Inc.*, 814 F. Supp. 1269, 1277 (E.D. Va. 1992); *United States v. Taylor*, 909 F. Supp. 355, 362-63 (M.D.N.C. 1995); *Adhesives Research v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1246 (M.D. Pa. 1996); *Cos. for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1999); *Control Data Corp. v. S.C.S.C.*, 53 F.3d 930, 936, n.9 (8th Cir. 1986); *Idlywoods Assoc. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1313 (W.D.N.Y. 1996); *Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 679-80 (D.N.J. 1996); *Consolidated Edison Co. v. UGI Utilities, Inc.*, 423 F.3d 90, 99-100 (2nd Cir. 2005); *Atlantic Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006).

[5] *See, e.g., Wickland, supra*, 792 F.2d at 890-91; *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290-91 (N.D. Cal. 1984); *United States v. New Castle County*, 642 F. Supp. 1258, 1262-64 (D. Del. 1986); *Stepan, supra*, 544 F. Supp. 1135 at 1143; *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916-17 (D. Okla. 1987); *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984); *Adhesives Research, supra*, 931 F. Supp. at 1238 (citing cases); *Artesian Water, supra*, 605 F. Supp. at 1356; *Centertor, supra*, 153 F.3d at 349-50; *Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 1993 U.S. Dist. LEXIS 14337, *8-9, 38 E.R.C. 1022 (D. Kan. 1993); *Con. Ed., supra*, 423 F.3d 99-100; *Atlantic Research, supra*, 459 F.3d at 835.

thereby signifying their deletion – at least as the government sees it. (Gov't. Br., pp. 18-19). The government's claim finds no support in the legislative commentary, and is easily explained by the fact that use of "any person" in proposed § 107(a)(4)(B) would have overlapped § 107(a)(4)(A). Because § 107(a)(4)(B) imposes liability for response costs incurred by governmental entities, "persons" as defined in § 101(21), the originally-proposed § 107(a)(4)(B) would have provided different remedies with different conditions for "any person," including both private parties and the government. Congress added the word "other" to preclude that duplication. There is no basis for the government's speculation that the change from "any person" to "any other person" was meant to exclude PRPs that would have been included in the preliminary draft.[6]

The government's second argument is that there was no need for Congress to distinguish governmental entities from private parties by use of the term "any other person" because the antecedent term "any other necessary costs of response" in § 107(a)(4)(B) did so – *i.e.*, those costs, recoverable by private parties, are different from "all costs of removal or remedial action" recoverable by governmental entities under § 107(a)(4)(A). (Gov't. Br., p. 20.) If the government were correct, § 107(a)(4)(B) would have provided "any other necessary costs of response consistent with the NCP." This is a hopelessly confusing sentence

[6] In any event, as the government concedes, Gov't. Br., p. 19, the legislative history does not reveal the reason for the change and is *not* inconsistent with the fact that PRPs qualify as "other persons" in § 107(a)(4)(B). *See, e.g., Martin v. Hadix*, 527 U.S. 343, 357 (1999) ("[T]he inference respondents draw from the legislative history is speculative . . . [because] it rests on [an] assumption [about] the *reason* [for the amendment]") (emphasis in original).

because it requires the reader to infer that "private parties" are the subject of this sentence, rather than governmental entities, and it creates confusion concerning the nature of, and conditions to recovering, the referenced response costs.[7]

Moreover, there are additional problems with the government's hypothesis. The government impermissibly gives the word "other" two different functions in the same clause: "other" in "other necessary costs" refers to § 107(a)(4)(A), while "other" in "any other person" refers not to § 107(a)(4)(A), but to § 107(a)(1)-(4), which lists the four categories of PRPs. Such inconsistencies must be avoided if possible; repetition of language in a statute should serve identical functions. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 378 (2005).

Additionally, the government's interpretation of "any other person" conflicts with the rule of the last antecedent, which states that "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005). The phrase "any other person" distinguishes those parties entitled to use § 107(a)(4)(B) from the immediately preceding list of government entities authorized to use § 107(a)(4)(A).

Finally, if it meant to prevent all PRPs from inclusion in § 107(a)(4)(B), Congress surely would have done so in 1986, when it added SARA. Instead, Congress confirmed

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[7] Indeed, under the government's reasoning, its interpretation of "other" in "other necessary costs" would itself be superfluous. If only non-PRPs are included in § 107(a)(4)(B), as the government argues, those persons cannot recover the costs recoverable by government entities under § 107(a)(4)(A), meaning that there is no need for "other" preceding "costs of response."

and ratified the interpretation that courts uniformly had given CERCLA in the period 1980-1986 – holding that PRPs were included in § 107(a)(4)(B). Indeed, it was the very fact that § 107(a)(4)(B) rendered PRPs liable to other PRPs for response costs they incurred, *i.e.*, that PRPs were included as "other persons" in § 107(a)(4)(B), that led pre-SARA courts to hold that where a *compelled* remediator incurred response costs, that party had an implied right to seek contribution from other PRPs.

For example, in *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986), the court held that while voluntary remediators had an express right under § 107(a)(4)(B) to seek partial cost recovery from other PRPs for voluntarily incurred first instance response costs, the issue was not so clear where a compelled remediator was involved. Because there was some question whether compelled payments constituted "response costs" at all under § 107(a)(4)(B), and whether the "any other person" referenced in § 107(a)(4)(B) included compelled remediators, and because Congress had not expressly provided contribution rights for those compelled remediators, the issue was whether contribution rights could be "implied" from § 107(a)(4)(B):

> The court agrees with the weight of authority and holds that a private right of action is authorized under CERCLA pursuant to section 107(a)(4)(B). The right of action emanates from the plain language of the section and provides relief to any person incurring response costs for which another person is otherwise liable under the Act.
>
> . . . Defendant/Third Party Plaintiffs argue that the same plain language of section 107(a)(4)(B)

> which supports a private right of action necessarily authorizes the right of a responsible party once sued to recover from another responsible party. This result, however, is not mandated by the plain language of section 107(a)(4)(B). Two phrases within section 107(a)(4)(B) raise serious questions as to the applicability of that provision as authority for a right to contribution. First, it is not clear that once a responsible party has been sued his monetary expenditures to abate an environmental hazard qualify as 'necessary costs of response' under the Act. Second, it is unclear whether the phrase 'any other person' in section 107(a)(4)(B) means only individuals engaged in voluntary cleanup or whether it also includes individuals who are CERCLA Defendants engaged in cleanup compelled by the threat of imminent statutory liability.
>
> The courts are in basic agreement on the fundamental question of whether a right to contribution exists under CERCLA. Most courts have held that the right does exist. Still, they have been unable to agree on the source of that authority. . . .

New Castle County, 642 F. Supp. at 1262.

The court proceeded to find that contribution was available to compelled remediators because § 107(a)(4)(B) expressly authorized cost recovery by one PRP against another, and because the legislative history underlying CERCLA disclosed that Congress authorized courts to determine a PRP's right to contribution as a matter of federal common law. Indeed, to support its conclusion that compelled remediators had a right to contribution under § 107(a)(4)(B), the court referenced the reasons for the pending SARA amendments, which were reflected in the legislative commentary:

> New subsection 113(f)(1) of CERCLA [contribution] also ratifies current judicial decisions that the courts may use their equitable powers to apportion the costs of clean-up among the various responsible parties involved with the site. Courts should resolve claims for apportionment on a case-by-case basis pursuant to Federal common law, taking relevant equitable considerations into account. . . .
>
> The amendment is necessary because the Supreme Court, in recent decisions, has refused to imply a right of contribution under other statutes unless expressly stated. These decisions could create doubt regarding the existence of a right of contribution under [CERCLA], despite several recent district court cases correctly confirming that we intend the law to confer such a right. . . .
>
> . . . All of the expert witnesses appearing before the Committee agree that the right to contribution should be codified in order to encourage responsible parties to engage in clean-up and settlement. *The committee proposal would codify the right and, retaining current law, would allow a judge the discretion and flexibility to best manage the contribution issues in a lawsuit. . . .*
>
> As with joint and several liability issues, contribution will be resolved pursuant to Federal common law.

New Castle County, 642 F. Supp. at 1267-68, citing 131 Cong. Rec. H11083 (daily ed. Dec. 5, 1985); 131 Cong. Rec. S11855, 11857 (daily ed. Sep. 20, 1985); S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1988) (emphasis added).[8]

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[8] In *Aviall, supra*, 543 U.S. at 162, the Court observed: "After CERCLA's enactment in 1980, litigation arose over whether § 107 . . . allowed a PRP that had incurred response costs to recover costs from

(Continued on following page)

The decision in *New Castle County* is especially significant because it held that a compelled remediator's right to contribution was dependent upon the fact that, as previous courts had concluded, PRPs had potential response cost liability to other PRPs as "other persons" under § 107(a)(4)(B). This same conclusion was reached by every pre-SARA court dealing with the issue of a compelled remediator's implied or common law right to contribution. *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255, 260 (E.D.N.Y. 1986) ("As a private party, however, Shore [a compelled remediator] must base its third party action for contribution from past owners and operators of the site . . . on section 107(a)(4)(B) of CERCLA, which allows recovery of response costs 'consistent with the [NCP]' "); *Sand Springs Home, supra*, 670 F. Supp. at 916-17; *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 226 (W.D. Mo. 1985).[9]

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other PRPs. More specifically, the question was whether a private party that had incurred response costs voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs. Various courts held that § 107(a)(4)(B) . . . authorized such a cause of action. [citing *Wickland* and *Stepan, supra*] . . . [L]*itigation also ensued over the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs.*" (Emphasis added). Thus, this Court recognized that the issue of contribution for compelled remediators was a wholly different issue from whether voluntary remediators could recover under § 107(a)(4)(B), which pre-SARA courts uniformly held they could. *See also Con. Ed., supra*, 423 F.3d at 97-98.

[9] The government contends that in *United States v. Westinghouse Elec. Corp.*, IP 83-9-C, 1983 WL 160587 (S.D. Ind. June 29, 1983), the district court held that PRPs had no implied right to contribution (Gov't. Br., pp. 5, 27). Notably, *Westinghouse* did not even mention § 107(a)(4)(B) in its decision, and certainly did not hold that PRPs could not be held liable for response costs incurred by voluntary remediators

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Not surprisingly, after SARA's passage in 1986, which confirmed and codified a compelled remediator's implied right to contribution under § 107(a)(4)(B), courts unanimously held that a PRP's right to contribution in § 113(f)(1) flowed solely from the fact that under § 107(a)(4)(B), PRPs, as "other persons," were liable to other PRPs that incurred recoverable response costs – that § 113(f) created no new rights, but provided only the "machinery" for permitting compelled remediators to obtain contribution from other PRPs, which had its source in § 107(a)(4)(B). *See, e.g.*, *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-02 (9th Cir. 1996) ("[T]he Pinal Group . . . as 'any other person' under § 107, can hold other PRPs liable. . . . While § 107 creates the right of contribution, the 'machinery of § 113' governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107."); *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993) ("Section 113(f) . . . does not create the right of contribution – rather, the source of a contribution claim is § 107(a). Section 107(a) governs liability, while § 113(f) creates a mechanism for apportioning that liability among responsible parties."); *In the Matter of Reading Co.*, 115 F.3d 1111, 1118-19 (3rd Cir. 1997) ("The 'any other costs of response' language within § 107(a)(4)(B) forms the basis for [plaintiff's] claim for [partial] recovery under that section. . . .

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under that provision. Indeed, the plaintiff in *Westinghouse* based its implied contribution claim not upon § 107(a), but rather upon § 106. This was because the defendant in *Westinghouse* was not even a PRP. Courts have repeatedly held that, for these reasons, *Westinghouse* is of no precedential import. *See, e.g., ASARCO, supra*, 608 F. Supp. at 1492; *Sand Springs, supra*, 670 F. Supp. at 917; *Conservation Chem., supra*, 619 F. Supp. at 228.

The language of § 113(f), permitting contribution, replaced the judicially-created right to contribution under § 107(a)(4)(B)."); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3rd Cir. 1997) ("Section 113 does not in itself create any new liabilities, rather it confirms the right of a [PRP] under § 107 to obtain contribution from other [PRPs]."); *Sun Co. Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (" . . . § 113(f) did not create a new cause of action, nor did it create any new liabilities. . . . It is no more than a 'mechanism' for apportioning CERCLA-defined costs . . . [W]hile a § 113 contribution action is not a "cost recovery" action under § 107 . . . because it does not impose strict joint and several liability on the defendant PRPs, it is an action for recovery of the costs referred to in § 107 . . . [A] PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is defined by § 107"); *Centerior Service Co., supra*, 153 F.3d at 350 ("The government asserts that . . . § 107 provides the basis and the elements of the claim for recovery of response costs and lists the parties who are liable, as well as defenses to liability, . . . that a § 113(f) action is an action to recover the necessary costs of response by any other person, as referred to in § 107. The action only happens to be an action for contribution. We agree.").

The holdings in each of these cases was premised upon the fact that absent a PRP's right to sue another PRP for response costs under § 107(a)(4)(B), as one of the "other persons" referenced therein, there never would have been an implied right to contribution in the first place. Stated another way, if, in 1980, Congress had not authorized PRPs to seek cost recovery from other PRPs in § 107(a)(4)(B), as the government now contends Congress did not, pre-SARA courts would have never overridden

that Congressional intent by implying a right of contribution from § 107(a)(4)(B).

The government now asks the Court to overrule 25 years of precedent to hold that PRPs are not included in § 107(a)(4)(B), and to find that § 113(f) created an exclusive cost recovery remedy for all PRPs, which did not exist prior to 1986. The government makes this claim despite the fact that it not only argued in *Centerior, supra*, that § 107(a)(4)(B) is the source of all § 113(f) contribution rights, but it did the same as an *amicus curiae* in *Aviall*: "Section 107(a)(4)(B)'s reference to 'any person' is broad enough to allow one jointly liable party to sue another for the former's response costs." (Gov't. *Amicus* Br., pp. 20-21.)

The Court should reject the government's *volte face*. To adopt the government's new interpretation of § 107(a)(4)(B) as excluding PRPs would not only ignore Congress's intent in enacting CERCLA and SARA, but would discard the well-reasoned decisions of countless courts holding just the opposite. Prior to SARA, courts unanimously held that voluntary remediators had an express right to seek partial cost recovery under § 107(a)(4)(B), and compelled remediators had an implied right to seek contribution. Congress added § 113(f) to remove any doubt about this latter implied right to contribution. However, Congress left intact the universally-recognized right of voluntary remediators to seek partial cost recovery under § 107(a)(4)(B). As the Court of Appeals noted below, if Congress had intended SARA to withdraw the well-established right of voluntary remediators to recover a portion of their response costs under § 107(a)(4)(B), Congress would have

done so explicitly. 459 F.3d at 836.[10] Not only did Congress not do so, but it emphasized that SARA was intended to confirm and ratify pre-SARA decisions interpreting § 107(a)(4)(B). Both prior to and after SARA, PRPs were and are among the "other persons" referenced in § 107(a)(4)(B).

B. The Government's Interpretation Of § 107(a)(4)(B) Conflicts With § 111(a).

In addition to providing parties with the opportunity to recover response costs from other PRPs, CERCLA created the so-called "Superfund" to help pay for cleanup costs. The primary purposes for which the Superfund was created were to finance "governmental response" and to pay "claims." *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986). To this end, § 111(a) provides, *inter alia*:

> The President shall use the money in the Fund for the following purposes:
>
> (1) Payment of governmental response costs incurred pursuant to § 9604 of this title . . . [*i.e.*, costs incurred by the United States to investigate and clean up sites].
>
> (2) Payment of any claim for necessary response costs incurred by *any other person* as a result of carrying out the national contingency plan. . . . (emphasis added).

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[10] This fact is consistent with this Court's characterization of the SARA amendments. *Aviall*, *supra*, 543 U.S. at 162-63, and n.8, *supra*. Also, as this Court has made clear, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979).

The § 111(a)(1) and (a)(2) language closely parallels the § 107(a)(4)(A) and (B) language: compare "payment of governmental response costs incurred pursuant to § 9604 of this title" (§ 111(a)(1)) to "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the [NCP]" (§ 107(a)(4)(A)), and "payment of any claim for necessary response costs incurred by any other person as a result of carrying out the [NCP]" (§ 111(a)(2)) to "any other necessary costs of response incurred by any other person consistent with the [NCP]" (§ 107(a)(4)(B)). This statutory parallelism establishes that the phrase "any other person" in § 111(a)(2) refers to any person other than a governmental entity, and the same phrase in § 107(a)(4)(B) has the same meaning. Because PRPs are included in the term "any other person" in § 111(a)(2), *see* 40 C.F.R. § 300.700(d)(5) and 307.22(b) (permitting PRPs to recover from the Superfund), PRPs are included in the same "any other person" language in § 107(a)(4)(B).

C. The Government's Interpretation Of § 107(a)(4)(B) Conflicts With The EPA's Interpretation Of That Provision.

If the government's position is that § 107(a)(4)(B) clearly excludes PRPs, one has to ask why the EPA itself, for over 20 years, has consistently taken the position that the phrase "any other person" in § 107(a)(4)(B) refers to persons "other than a governmental entity," not "other than a PRP." When the EPA proposed amendments to the NCP in 1985, it specifically stated that PRPs could bring claims under § 107(a)(4)(B): "The new § 300.71 addresses the requirements the NCP imposes on parties other than the lead agency (including responses by *responsible*

parties, other private parties and Federal and State governments)." 50 Fed. Reg. 5862, 5870 (1985) (emphasis added). Because a "responsible party's" satisfying the NCP is relevant only if that party may recover response costs under § 107(a)(4)(B), the EPA's directive necessarily means that, in the EPA's view, § 107(a)(4)(B) includes PRPs within its scope.

If there were any doubt, it is resolved by the current C.F.R. provisions, which unequivocally provide that "any person," including PRPs, may recover response costs under § 107(a)(4)(B). 40 C.F.R. § 300.700, which addresses NCP requirements for "other persons," states:

> (c) Section 107(a) cost recovery actions. . . .
>
> . . .
>
> (2) Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other person consistent with the NCP.
>
> (3) For purposes of cost recovery under § 107(a)(4)(B) of CERCLA:
>
> . . .
>
> (ii) any response action carried out in compliance with the terms of an order issued by EPA pursuant to § 106 of CERCLA, or a consent decree entered into pursuant to § 122 of CERCLA, will be considered 'consistent with the NCP'.

Because only PRPs may be the subject of a § 122 consent decree or a § 106 order, the EPA has acknowledged that PRPs are "other persons" under § 107(a)(4)(B). The government's claim that PRPs are excluded from that provision cannot be reconciled with the regulations enacted by the agency designated to enforce CERCLA. As this Court has repeatedly recognized, an agency's interpretation of its regulations is "of controlling weight unless it

is plainly erroneous or inconsistent with the regulations." *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The government's recent about-face is inconsistent with EPA's longstanding and justified interpretation of its own regulations.

D. Acceptance Of The Government's Interpretation Of § 107(a)(4)(B) Would Have Unreasonable Consequences.

The government's premise that Congress intended to provide PRPs that are *compelled* to engage in response actions, or to pay for them, with the right to obtain partial cost recovery under § 113(f), but to deny cost recovery to all voluntary remediators, is manifestly unreasonable and contrary to public policy. As the Court of Appeals observed below: "We discern nothing in CERCLA's words suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting – indeed penalizing – those who voluntarily assume such duties." 459 F.3d at 836. The fact is SARA did not disturb the well-recognized right of PRPs that voluntarily incur first instance response costs in cleaning up contaminated sites to obtain partial cost recovery under § 107(a)(4)(B). *See* pp. 15, 19-20 and nn.8 and 10, *supra*. SARA was enacted to address contribution issues only, and confirmed the right to contribution for compelled remediators. The § 107(a)(4)(B) right to partial cost recovery by voluntary remediators was explicit and well-established; it needed no Congressional confirmation. As the Court of Appeals observed in this case, "[I]f Congress intended Section 113 to completely replace Section 107 in all circumstances,

even where a plaintiff was not eligible to use Section 113, it would have done so explicitly." 459 F.3d at 836.

Finally, the government's interpretation of § 107(a)(4)(B) would produce uniquely unreasonable results at the many thousands of sites – including the site at issue in this case – that have been contaminated by departments and agencies of the United States itself. These include not just the sites actually owned and operated by the United States, but also the many private sites to which the United States has contributed hazardous waste. If the government's interpretation of § 107(a)(4)(B) were correct, absent state action at a site, the government is effectively insulated from liability because no voluntary remediator, such as ARC, can ever recover response costs from the government.

Section 120(a)(1) of CERCLA provides that the United States is liable "in the same manner and to the same extent ... as any non-governmental entity, including liability under [§ 107]." Significantly, EPA has long been prohibited from proceeding against other federal agencies under CERCLA (*see* Exec. Order No. 12580, § 4(a), 52 Fed. Reg. 2923 (Jan. 23, 1987)). Thus, the government's interpretation of § 107(a)(4)(B) necessarily means that unless a State sues a PRP, or enters into a settlement agreement with a PRP, including the United States, the latter can avoid all CERCLA liability by simply deciding not to sue, or to enter into any settlement agreement with, a PRP. This result undermines the Congressional purpose of § 120(a), *i.e.*, placing the United States on an equal footing with private PRPs. This is particularly problematic because the United States, unlike private PRPs, cannot be sued under state law in state courts.

While none of these facts was terribly significant prior to *Aviall* because a pending or completed CERCLA civil action was not a § 113(f) prerequisite for recovering response costs, after *Aviall*, the absence of any enforcement action by the United States would effectively provide the government with a "get out of jail free card," unless a given state takes action to remediate a site. It was this claim to quasi-immunity by the government that lead the Eighth Circuit to characterize the government's claim that voluntary remediators have no cost recovery claim under § 107(a)(4)(B) as "bizarre:"

> A contrary ruling, barring [ARC] from recovering a portion of its costs, is not only contrary to CERCLA's purpose, but results in an absurd and unjust outcome. Consider: in this, of all cases, the United States is a liable party (who else has rocket motors to clean?). It is, simultaneously, CERCLA's primary enforcer at this, among other Superfund sites. . . .
>
> If we adopted the Government's reading of § 107, the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination.
>
> . . .
>
> The Court, then, concludes Congress resolved the question of the United States' liability 20 years ago. It did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power. *Congress put the public's right to a clean and safe environment ahead of the sovereign's traditional immunities.*

459 F.3d at 837 (emphasis added). This Court should similarly reject the government's irrational interpretation of § 107(a)(4)(B).

E. The Government's Interpretation Of § 107(a)(4)(B) Also Undermines The Principal Purposes Underlying CERCLA.

For 25 years, courts have repeatedly recognized CERCLA's principal purposes are to achieve the swift, effective and voluntary clean up of contaminated sites and to make those responsible for the contamination pay for the cleanups. *See, e.g.*, H.R. Rep. No. 96-1016, pt. 1, at 16-17 (1980) (CERCLA "would also establish a federal cause of action . . . to induce such persons voluntarily to pursue appropriate environmental response actions."); 131 Cong. Rec. 24725, 24730 (1985) ("The goal of CERCLA is to achieve effective and expedited cleanup. . . . One important component . . . must be the encouragement of voluntary cleanup actions or funding without having the President rely on the panoply of administrative and judicial tools available."). *See also Key Tronic v. United States*, 511 U.S. 809, 815, n.6 (1994); *Artesian Water Co., supra*, 605 F. Supp. at 1356; *Bulk Distribution Centers, supra*, 589 F. Supp. at 1443-44; *Colorado v. ASARCO, Inc., supra*, 608 F. Supp. at 1491.

The government's interpretation of § 107(a)(4)(B) would defeat rather than advance the Congressional purposes underlying CERCLA. First, by excluding PRPs from § 107(a)(4)(B), the government would discourage PRPs from undertaking prompt cleanups on a voluntary basis; PRPs would have a disincentive to clean up contaminated sites. Second, the government's interpretation of § 107(a)(4)(B) violates the "polluter pays" principle. Here,

although both ARC and the United States (Department of Defense) are responsible for the contamination, ARC bears 100% of the cost, and the United States avoids liability altogether.

This clash with the principal purposes of CERCLA, among other reasons, prompted the Second, Seventh and Eighth Circuits to reject the government's interpretation of § 107(a)(4)(B). As the Seventh Circuit observed in *Metropolitan Water*, *supra*, 473 F.3d at 836:

> . . . [W]e are concerned that prohibiting suit by a voluntary plaintiff like Metropolitan Water may undermine CERCLA's twin aims of encouraging expeditious, voluntary environmental cleanups while holding responsible parties accountable for the response costs that their past activities induced. As *Consolidated Edison, Atlantic Research*, and several post-*Cooper Industries* district court decisions have recognized, in order to further CERCLA's policies, potentially responsible parties must be allowed to recover response costs even before they have been sued themselves under CERCLA or have settled their CERCLA liability with a government entity. Were a cost recovery action unavailable in these circumstances, the Second Circuit reasoned, 'such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit.' *Consol. Edison*, 423 F.3d at 100. As the court concluded, this result 'would undercut one of CERCLA's main goals, encouraging private parties to assume the financial responsibility of cleanup costs by allowing them to seek recovery from others.'

See also dissenting opinion of Judge Sloviter in *E. I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 547-49 (3rd Cir. 2006).[11]

The government's proffered interpretation of § 107(a)(4)(B), excluding PRPs from its scope, undermines CERCLA's goals as it will inevitably discourage and delay cleanups. PRPs at the vast majority of contaminated sites where there is no governmental suit or settlement will escape having to pay anything because there will be no CERCLA mechanism to provide cost recovery to PRPs who want to do the right thing and voluntarily clean up contaminated sites. Moreover, the government can largely avoid its responsibility for cleaning up a site simply by taking no enforcement action. Such results cannot be countenanced; *all* PRPs unquestionably fall within "other persons" language in § 107(a)(4)(B), as every court considering the issue for the last 25 years has held.

II. VOLUNTARY REMEDIATORS, SUCH AS ARC, HAVE A VIABLE COST RECOVERY ACTION UNDER § 107(a)(4)(B).

Because PRPs are included in the term "any other person" in § 107(a)(4)(B), application of that provision in this case results in the following statutory directive: "[The United States] shall be liable for . . . necessary costs of response incurred by [ARC] consistent with the [NCP]." Regardless of whether this language is deemed to create an express cause of action or only an implied one in favor of ARC,[12] it undisputedly creates a cause of action. The

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[11] These recent observations are nothing new. As far back as 1986, in *New Castle County, supra*, 642 F. Supp. at 1264-65, the court came to the very same conclusions.

[12] *See Key Tronic, supra*, 511 U.S. at 818 and n.11, 822.

only remaining question is whether that cause of action may be asserted under § 107(a)(4)(B), or whether it must be asserted exclusively under § 113(f), as the government maintains.

Section 113(f), as its heading denotes, governs actions for contribution. As previously observed, contribution is a remedy available to persons who are jointly liable to a third party, and one of the jointly-liable parties is compelled to pay more than its fair share of that liability. *See Centerior, supra*, 153 F.3d at 350-51; *Con. Ed., supra,* 423 F.3d at 97-98. Prior to § 113(f) becoming a part of CERCLA in 1986, courts were confronted with two separate and distinct issues relating to cost recovery by PRPs: (1) whether *voluntary remediators* could recover a portion of their response costs from other PRPs directly under § 107(a)(4)(B), and (2) whether *compelled remediators* could recover a portion of their response costs from other PRPs as "contribution" under CERCLA.

The first issue was easily resolved – courts unanimously held that voluntary remediators had a right to obtain partial cost recovery under § 107(a)(4)(B). *See supra*, pp. 13-20. Contribution was not even an issue in these cases because plaintiff PRPs were not compelled to undertake any cleanup action or to pay for any such action undertaken by others, and there was no joint liability with any other PRP. Indeed, voluntary remediators, while *potentially responsible* for cleaning up a site or paying for a cleanup, were not *actually liable* under CERCLA at all; this was because no other person had incurred any response costs at the site (including the absence of enforcement activities) – a necessary condition for the accrual of any CERCLA liability. Thus, the issue of contribution did not even arise in these cases.

The issue not so easily resolved was whether *compelled remediators* had a right to contribution from other PRPs, a right not expressly found in § 107(a)(4)(B). These compelled remediators had been required to perform a response action or to pay for a response action and were jointly liable with other PRPs. Pre-SARA courts held that a right to contribution could be implied from the provisions in § 107(a)(4)(B), and the "savings clause" in § 107(e)(2). *See* pp. 15-20, 23-24, *supra*. Section 113(f) was added in 1986 to confirm and codify this right to contribution. It is undisputed that Congress did not intend to modify, curtail or withdraw any other right of cost recovery provided in § 107(a), such as the right voluntary remediators had to obtain partial cost recovery under § 107(a)(4)(B). *Id.*

Although post-SARA appellate decisions erroneously determined that *all* claims for partial cost recovery could be maintained under § 113(f), *i.e.*, claims by voluntary remediators and compelled remediators alike, which *Aviall* corrected, there is no question but that this "correction" did not disturb the fact that, as all pre-SARA courts had held, voluntary remediators have a right to seek partial cost recovery from other PRPs. Now, as was the case prior to the post-SARA courts' misdirecting all claims for partial cost recovery to § 113(f), the source of partial cost recovery for voluntary remediators is § 107(a)(4)(B). *See Con. Ed., supra*, 423 F.3d at 100. The government's arguments to the contrary not only repudiate the position it took as an *amicus curiae* in *Metropolitan Water*, to the effect that § 107(a)(4)(B) permits cost recovery by parties who perform a cleanup without having any actual CERCLA liability or obligation to do so, *see* pp. 5-6, *supra*, but the government's arguments do not withstand analysis in any event.

A. Allowing A Voluntary Remediator To Proceed Under § 107(a)(4)(B) Has No Effect On The Applicable Statute Of Limitations.

The government first argues that if § 107(a)(4)(B) is interpreted to permit voluntary remediators to initiate cost recovery actions, it would allow them to avoid the shorter 3-year statute of limitations applicable to contribution claims brought pursuant to §§ 113(f)(1) and 113(f)(3)(B), which is contained in § 113(g)(3) – that it would inappropriately enable voluntary remediators to "elect" the longer 6-year statute of limitations for cost recovery actions contained in § 113(g)(2). (Gov't. Br., p. 30-31.) This is untrue.

There is no "option" afforded any PRP to "elect" which statute of limitations applies. Rather, the applicable statute of limitations is defined by the language in §§ 113(g)(2) and (g)(3). Even a cursory reading of those provisions discloses that the 3-year statute of limitations in § 113(g)(3) applies only to contribution actions by PRPs seeking reimbursement for response costs they have been compelled to pay to another party, either by way of judgment or by settlement. The 3-year statute of limitations provision does not apply to first instance response costs. Courts have repeatedly held that all actions for first instance response costs, whether asserted in a cost recovery claim under § 107(a)(4)(B), *i.e.*, by a voluntary remediator, or in a contribution action under § 113(f)(1), *i.e.*, by a compelled remediator, are not governed by the 3-year statute of limitations in § 113(g)(3), but by the 6-year statute of limitations in § 113(g)(2). *See, e.g., Taylor, supra*, 909 F. Supp. at 365; *Centerior, supra*, 153 F.3d at 355; *Sun Co. Inc., supra*, 124 F.3d at 1192-93; *Pinal Creek, supra*,

118 F.3d at 1305, n.7.[13] Recognizing that voluntary remediators have a viable § 107(a)(4)(B) action does not provide them with any "option" to elect a more favorable statute of limitations.

B. Nothing In CERCLA Requires Courts To Impose Joint And Several Liability In All Cost Recovery Actions Brought Under § 107(a)(4)(B).

Next, the government contends that if voluntary remediators may assert § 107(a)(4)(B) claims against other PRPs, the former would be able to impose joint and several liability for indemnity upon the latter, thus rendering them liable for contamination caused by every other PRP, including those no longer in existence or no longer solvent (*i.e.*, for so-called "orphan shares" of liability). According to the government, this is inappropriate because voluntary remediators must bear some responsibility for contamination at a site, and thus can recover only an equitable share of response costs, a "quintessential contribution claim" governed by § 113(f). The result, according to the government, is that § 113(f) is the sole source of a voluntary remediator's right to partial cost recovery. (Gov't. Br., pp. 13, 31-34, 37.) There are a number of flaws in the government's characterization of § 107(a)(4)(B) and § 113(f).

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[13] Notably, a PRP's settlement with the United States or a State, which may lead to a contribution action under § 113(f)(3)(B), includes settlements involving "costs of a response action," *i.e.*, compelled "cost reimbursement," and, separately, settlements resulting in the PRP's undertaking a compelled first-instance response action, *i.e.*, "for some or all of a response action.". A contribution action filed after this latter type of settlement is necessarily governed by the 6 year statute of limitations in § 113(g)(2).

First, a claim for partial cost recovery is not a "quintessential claim for contribution." Contribution *always* requires compelled payment by a party sharing a common or joint liability with another. *See, e.g., Centerior, supra*, 153 F.3d at 350-51; *Con. Ed., supra*, 423 F.3d at 97-98. While several liability, as opposed to joint and several liability, is a *result* of a successful contribution claim, it is not an *element* of that claim. The fact that a plaintiff is entitled to impose only several liability upon another party does not convert the claim into one for contribution.[14]

Second, nothing in CERCLA *requires* the imposition of joint and several liability under § 107(a)(4)(B). As the Court of Appeals held below, " . . . § 107 is not limited to parties seeking to recover 100% of their costs." 459 F.3d at 835. Rather, the issue of whether joint and several liability is appropriate under § 107(a)(4)(B) was intended by Congress to be determined by the courts on a case-by-case basis, employing principles of equity and fulfilling the purposes of CERCLA.

Beginning in 1983, in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), courts have held, with unanimity, that § 107(a)(4)(A) cost recovery actions by governmental entities result in joint and several liability requiring indemnity. These courts reasoned that joint and several liability was necessary to promote the effective enforcement of CERCLA by governmental entities, and best enabled the United States to recover its own expenditures and replenish the Superfund. *Chem-Dyne,*

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[14] Significantly, issues of joint and several liability versus several liability only arise where there are multiple sources of liability. If there is only one liable party, the plaintiff's contributory responsibility for harm is typically the subject of an affirmative defense, much like contributory negligence.

supra, 572 F. Supp. at 808; *United States v. Kramer*, 757 F. Supp. 397, 416-17 (D.N.J. 1991); *United States v. A & F Materials Co., supra*, 578 F. Supp. 1249, 1255.[15]

With little analysis, most courts also held that § 107(a)(4)(B) actions would result in joint and several liability for indemnity, subject to a contribution counterclaim. *See, e.g., Taylor, supra*, 909 F. Supp. at 364-66; *Kramer, supra*, 757 F. Supp. at 416-17; *Chesapeake, supra*, 814 F. Supp. at 1278-79; *Adhesives Research, supra*, 931 F. Supp. at 1243-44; *Charter Township of Oshtemo v. The Upjohn Co.*, 910 F. Supp. 332, 337 (W.D. Mich. 1995); *Cos. for Fair Allocation, supra*, 853 F. Supp. at 579-80; *Transportation Leasing Co. v. California*, 961 F. Supp. 931, 938 (C.D. Cal. 1992). The principal reason given was the perceived need to provide a sufficient incentive for PRPs to voluntarily clean up sites. The courts believed that absent the financial incentive provided by joint and several liability for indemnity, governmental entities would be forced to expend their limited resources to either perform the cleanups themselves or to compel them – an undesirable result. *Id.*

A number of courts, however, observed that joint and several liability is not necessarily appropriate in all § 107(a)(4)(B) actions – that there may be policy reasons or equitable considerations precluding its application. In *A & F Materials, supra*, 578 F. Supp. at 1255-56, after a

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[15] Governmental entities recovering under § 107(a)(4)(A) would be subject to contribution counterclaims or contribution-type equitable offsets. *See, e.g., United States v. Mottolo*, 605 F. Supp. 898, 910-11 (D.N.H. 1985); *Kramer, supra*, 757 F. Supp. at 412-17; *Conservation Chemical, supra*, 619 F. Supp. at 205; *Taylor, supra*, 909 F. Supp at 362. Also, "orphan shares" would be subject to allocation in that counterclaim. *See* n.16, *infra*.

thorough review of CERCLA's legislative history, the court concluded that Congress intended courts to determine the scope of liability on a case-by-case basis, and that § 107(a)(4)(B) claims, in appropriate cases, could result in several liability only.

A & F was followed by *Allied Chemical Corp. v. Acme Solvents Reclaiming Inc.*, 691 F. Supp. 1100, 1115-16 (N.D. Ill. 1988):

> Though the amendments under SARA are silent on the scope of liability under Section 107, the House did comment on the issue. In its report, the House stated that it 'fully subscribes to the reasoning of the court in the seminal case of *U.S. v. Chem-Dyne* . . . which established a uniform federal rule allowing for joint and several liability in *appropriate* CERCLA cases.' (emphasis added.)

The court in *Allied* held that a "moderate approach" to joint and several liability, adopted in *A & F*, was appropriate:

> The moderate approach involves employing the *Chem-Dyne*-Restatement rule as a general rule susceptible to exceptions. Under the moderate approach, if the court finds that the injury is indivisible, the court has the discretion to hold the defendants jointly and severally liable. The court may, on the other hand, reject joint and several liability, regardless of the indivisibility of the harm, where the peculiar facts of the case point to a more fair apportionment of liability.

691 F. Supp. at 1116-18; *see also Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 1993 U.S. Dist. LEXIS 14337, 38 E.R.C. 1022 (D. Kan. 1993); *In the Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 895-902 (5th Cir. 1993); *United States v. Burlington Northern & Santa Fe*

Ry. Comm., No. 03-17169, *3224-3229 (9th Cir., March 16, 2007).[16]

While, hypothetically, there might be some circumstances justifying the imposition of joint and several liability for indemnity in § 107(a)(4)(B) actions, typically, the relief should be several liability – a contribution-like remedy permitting partial cost recovery. In any event, the issue is immaterial here. This is because ARC acknowledges that where a § 107(a)(4)(B) action is brought against the United States as a PRP, liability should be several only. There is no compelling policy reason supporting the imposition of joint and several liability upon the United States in cases such as this one; while the United States should be financially responsible for its own share of the contamination at a given site, taxpayers should not have to assume the liability of all other enterprises contributing to the contamination.

Because ARC does not seek to impose joint and several liability for full cost recovery against the United States, the so-called "joint and several liability" issue identified by the government is immaterial to the outcome of this case – all that ARC could ever expect to recover from the United States are the costs ARC has incurred exceeding its own fair share of responsibility.

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[16] The apportionment of so-called orphan shares, if any, would be resolved in apportionment proceedings. Under § 107(a)(4)(B), courts can and have allocated orphan shares among PRPs, including a plaintiff PRP. *See, e.g., Charter Township of Oshtemo v. Am. Cyanamid Co.*, 898 F. Supp. 508-09 (W.D. Mich. 1995); *United States v. Davis*, 31 F. Supp. 2d 45, 62 (D.R.I. 1998); *Chesapeake & Potomac, supra*, 814 F. Supp. at 1277-78; *Town of Windsor v. TESA Tuck, Inc.*, 919 F. Supp. 662, 681-82 (S.D.N.Y. 1996); JAMES T. O'REILLY & CAROLINE BROWN, RCRA AND SUPERFUND: A PRACTICE GUIDE, § 14.58 (citing cases) ("[N]othing in CERCLA prohibits allocating portions of the orphan shares to [PRPs].").

C. Courts Retain The Power To Protect Settling PRPs.

The government next contends that if voluntary remediators are allowed to bring cost recovery actions under § 107(a)(4)(B), they would be able to eviscerate the § 113(f)(2) contribution protection afforded compelled remediators that have resolved their liability to the United States or a State in an administrative or judicially-approved settlement. (Gov't. Br., pp. 13, 37-39.) Once again, the government invents a problem that does not exist.

The contribution bar in § 113(f)(2) applies to settlements with the United States or a State "regarding matters addressed in the settlement." The reach of the settlement agreement, then, is limited by what comes within the definition of "matters addressed." Parties other than the settling governmental entity may assert claims under § 107(a)(4)(A) and § 107(a)(4)(B) against a settling party where the claim is not one coming within the "matters addressed" in the settlement. *See, e.g., Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 765-70 (7th Cir. 1994). If the settlement only resolves costs incurred, or to be incurred, by the settling governmental entity, the scope of the contribution protection would not protect the settling party from a voluntary remediator's § 107(a)(4)(B) claim for partial cost recovery – that would not constitute a benefit the compelled remediator received as part of "settling its liability." However, if the settling party resolved its liability for response costs incurred by any person, including costs incurred by voluntary remediators, the contribution protection arguably would extend to § 107(a)(4)(B) claims by voluntary remediators. *Id.*

The fact that § 107(a)(4)(B) claims by voluntary remediators are not contribution claims *per se*, does not, however, enable voluntary remediators to avoid the effect of the contribution bar where the compelled remediator's settlement with the governmental entity actually provides that protection. This is because, as previously noted, joint and several liability is not mandated for all § 107(a)(4)(B) actions by voluntary remediators. Rather, courts may *always* protect settling parties, where appropriate, by limiting the liability of the settling party to the liability it has discharged in its settlement agreement with the governmental entity. In this manner, compelled remediators will receive precisely the same settlement protection they would obtain in any contribution claim against them. Recognizing a voluntary remediator's right to obtain partial cost recovery under § 107(a)(4)(B) will not permit it to make an end-run around the § 113(f)(2) settlement protection afforded settling parties as the government maintains.

D. The Availability Of § 107(a)(4)(B) Cost Recovery Claims Will Not Deter Settlements.

Next, the government claims that if voluntary remediators are allowed to bring cost recovery actions under § 107(a)(4)(B), there would be no incentive for those entities to enter into settlements with the United States or a State, because that would relegate them to seeking contribution from other PRPs under § 113(f)(3)(B). According to the government, this disincentive results from the "fact" that § 107(a)(4)(B) provides more generous remedies, including a longer statute of limitations, joint and several liability, indemnity, the ability to avoid the statutory bar precluding contribution actions against settling parties,

etc. (Gov't. Br., pp. 13-14, 31, 36-43.) Also, the government suggests that negotiated settlements are necessary to allow the government to directly control and supervise cleanups. (Gov't. Br., pp. 41-43.) Once again, the government is mistaken.

As previously noted, none of the government's so-called "advantages" of § 107(a)(4)(B) claims actually exists. Moreover, the availability of a § 107(a)(4)(B) cost recovery claim for voluntary remediators will not deter settlements; PRPs in ARC's position will still have a strong incentive to settle with the government because absent such a settlement, they may later become the subject of a government enforcement action or a cost recovery action. Also, settling parties enjoy the contribution immunity afforded by § 113(f)(2), and whenever a party undertakes a first instance response action pursuant to settlement with the government, the costs of such an action are deemed consistent with the NCP, thereby precluding the settling party from having to establish compliance with the NCP in order to recover response costs from others. *See* 40 C.F.R. § 300.700(c)(3)(ii). Establishing compliance with the NCP is both critical and onerous, however, when a voluntary remediator seeks cost recovery under § 107(a)(4)(B). *See* § 300.700(c)(3)(i) and 300.700(c)(5) and (6).

While the government may view cleanups undertaken pursuant to settlements as "preferable" to unsupervised voluntary cleanups, CERCLA manifestly does not require government approval in actions brought pursuant to § 107(a)(4)(B), as in the case where a party seeks recovery from the Superfund under § 111(a)(2). *See, e.g., Wickland, supra*, 792 F.3d at 891-92; *Pinole Point, supra*, 596 F. Supp. at 289-90; *Allied Chemical, supra*, 691 F. Supp. at 1106-08; 40 C.F.R. § 300.700(d) (requiring pre-authorization

from the EPA). Even the government concedes that *sua sponte* cleanups are better than no cleanup (Gov't. Br., pp. 41-42.). Indeed, as Judge Sloviter, dissenting in *E. I. du Pont, supra*, 460 F.3d at 549, recognized, it is one thing to *encourage* settlements, it is another to *require* them as a condition to obtaining partial cost recovery.

The EPA's expressed concerns about the quality of voluntary cleanups, referenced in the government's brief, pp. 40-43, hardly means that the EPA was suggesting to throw the baby out with the bath water – rather, instead of *requiring* settlements with government entities, which the government cannot be compelled to conclude, EPA encouraged settlements to avoid later problems with establishing that the remedial action complied with the NCP – otherwise, voluntary remediators have to carefully tailor their response activities to ensure compliance. The EPA also *suggested*, not *mandated*, some government involvement to ensure that site closure could be accomplished, and so that voluntary remediators would be able to obtain partial cost recovery from other PRPs, rather than face potential enforcement action by the government.

E. The Government's Reliance On Pre-*Aviall* Case Law Is Misplaced.

Finally, in arguing that § 113(f) is the sole cost recovery remedy available to voluntary remediators, the government relies on pre-*Aviall* cases holding that PRPs could only sue for cost recovery allocation under § 113(f), not § 107(a)(4)(B). (Gov't. Br., pp. 6, n.5, 30-31.) The essential predicate underlying all of these decisions was the mistaken view that § 107(a)(4)(B) necessarily imposed joint and several liability for indemnity, whereas § 113(f) provided the sole statutory basis for partial cost recovery,

i.e., several liability, and that § 113(f) permitted partial cost recovery by *all* PRPs, regardless of whether any § 106 or § 107(a) action had been filed, regardless of whether any given PRP was jointly liable with anyone, and regardless of whether response costs had been compelled by order, judgment or settlement. The courts' collective erroneous view of § 113(f) led them to conclude that § 113(f) would be rendered superfluous if partial cost recovery or "several liability" claims were recognized under § 107(a)(4)(B) – meaning that only non-PRPs could use that provision, as only non-PRPs are entitled to full cost recovery or indemnity. *See* cases cited in Gov't. Br., p. 6, n.5. As the Eighth Circuit described it, this "traffic directing" by pre-*Aviall* courts, compelling all PRPs to use § 113(f) to obtain partial cost recovery, "dramatically narrowed § 107 by judicial fiat." 459 F.3d at 832.

The first court to reject the flawed premise underlying the pre-*Aviall* cases was the Second Circuit Court of Appeals, in *Con. Ed., supra*, holding that voluntary remediators have a right to assert a § 107(a)(4)(B) cost recovery claim, whereas compelled remediators are confined to § 113(f) contribution actions. 423 F.3d at 100-102. The court distinguished its pre-*Aviall* decision in *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2nd Cir. 1998), on the ground that the PRP seeking cost recovery in that case had incurred response costs only after having entered into a consent decree, *i.e.*, only after resolving its liability as a compelled remediator.[17] *Id. See also Schaefer v. Town of*

[17] The court in *Con. Ed.* held that to the extent that § 107(a)(4)(B) permitted full cost recovery, the PRP defendant could file a § 113(f)(1) counterclaim for contribution, thereby reducing the plaintiff PRP's recovery by its allocated share of responsibility. 423 F.3d at 100, n.9. The court did not mention the issue of joint and several liability.

(Continued on following page)

Victor, 457 F.3d 188 (2nd Cir. 2006) (holding that response costs incurred *before* entering into a consent order were recoverable under § 107(a)(4)(B) because the plaintiff was a voluntary remediator at that time).

After *Con. Ed.*, the Eighth Circuit Court of Appeals in the present case agreed with the Second Circuit, holding that voluntary remediators may seek partial cost recovery under § 107(a)(4)(B), and also holding that this provision is not confined to claims seeking full cost-recovery or indemnity:

> We recognize that § 107 allows 100% cost recovery. Some pre-*Aviall* cases justified denying liable parties access to § 107, reasoning Congress would not have intended them to recover 100% of their costs and effectively escape liability . . .
>
> But § 107 is not limited to parties seeking to cover 100% of their costs. To the contrary, the text of § 107(a)(4)(B) permits recovery of 'any other necessary costs of response . . . consistent with the national contingency plan.' While these words may 'suggest full recovery,' . . . they do not compel it. . . . CERCLA, itself, checks overreaching liable parties: If a plaintiff attempted to use § 107 to recover more of its fair share of reimbursement a defendant would be free to counterclaim for contribution under § 113(f). *Consolidated Edison*, 423 F.3d at 100, n.9; *Redwing Carriers*, 94 F.3d at 1495. Accordingly, we find that allowing Atlantic's claim for direct recovery under § 107 is entirely consistent with the text and purpose of CERCLA.

459 F.3d at 835.

Because § 107(a)(4)(B) does not compel application of joint and several liability upon the United States, no contribution counterclaim is needed.

The court correctly concluded that to accept the government's claim that § 113(f) provided the sole source of cost recovery for voluntary remediators would mean that SARA withdrew the prior universally-recognized right of voluntary remediators to recover a portion of their response costs under § 107(a)(4)(B), which not only had no factual support, but directly conflicted with the legislative intent underlying SARA, *i.e.*, to ratify and confirm the pre-SARA interpretation given § 107(a)(4)(B): "[I]f Congress intended Section 113 to completely replace Section 107 in all circumstances, even where a plaintiff was not eligible to use Section 113, it would have done so explicitly." 459 F.3d at 836.

The Third Circuit came to the opposite conclusion in *E. I. du Pont, supra*. E. I. du Pont voluntarily undertook to clean up a site that formerly had been owned and allegedly contaminated by the United States, and then brought a CERCLA cost recovery action against the United States. In a 2-to-1 decision, the court concluded that *Aviall* did not give it cause to reconsider its pre-*Aviall* precedents which held that *all* PRPs were limited to contribution claims under § 113(f). The court held that § 107(a)(4)(B) provided no basis for E. I. du Pont, as a voluntary remediator, to obtain partial cost recovery because that provision was limited to joint and several liability claims for indemnity, whereas § 113(f) was the source of all partial cost recovery claims:

> [B]ecause § 107 imposes strict, joint and several liability on all PRPs for the costs of a cleanup, a PRP allowed to bring a cost recovery claim action under § 107 against another PRP 'could recoup all of its expenditures regardless of fault – which . . . strains logic.'

E. I. du Pont, 460 F.3d 521-22. Much like its pre-*Aviall* counterparts, the court totally ignored the fact that contribution is available only to jointly *liable* parties, one of

which is *compelled* to pay more than its fair share of that common liability. Also, as in many pre-*Aviall* cases, the court erroneously concluded that § 107(a)(4)(B) provides joint and several liability for indemnity only.

Finally, and most recently, the Seventh Circuit decided *Metropolitan Water, supra*. Like Consolidated Edison and ARC, Metropolitan Water was a voluntary remediator because no person other than Metropolitan Water had incurred any response costs at the site involved – no enforcement action had been undertaken. The court, as in *Con. Ed.* and *Atlantic Research*, expressly rejected the interpretation of § 107(a)(4)(B) proffered by the government here, *i.e.*, that "any other person" does not include PRPs, and adopted the reasoning in *Con. Ed.* and *Atlantic Research*, holding that voluntary remediators may seek partial cost recovery under § 107(a)(4)(B). The court observed that because Metropolitan Water had conducted the cleanup when no other party had taken remedial action, there was no common liability with any other PRP, an essential element of contribution: "Therefore, Metropolitan Water's action under § 107 is characterized more appropriately as a cost recovery action than as a claim for contribution." *Id.*, 473 F.3d at 836 n.17.

ARC submits that *Con. Ed.*, *Atlantic Research*, and *Metropolitan Water*, respectively, correctly concluded that voluntary remediators, such as ARC, may pursue § 107(a)(4)(B) cost recovery claims against other PRPs, such as the United States. While none of these cases specifically addressed the issue of joint and several liability, where the United States is a PRP subject to a § 107(a)(4)(B) action by a voluntary remediator, the United States' potential liability should be several only. The *Con. Ed.*, *Atlantic Research* and *Metropolitan Water* decisions

are consistent with the language of § 107(a)(4)(B) which, in this case, effectively provides that the United States is liable for a portion of the necessary costs of response incurred by ARC consistent with the NCP. The liability of the United States exists under § 107(a)(4)(B), not § 113(f), and is several only, permitting ARC to recover an equitable share of the cleanup costs it has incurred at the Camden, Arkansas site. To hold otherwise would effectively write § 107(a)(4)(B) out of CERCLA for those PRPs that voluntarily engage in site cleanup, and would virtually immunize the United States from assuming its fair share of responsibility for contaminating sites all over the country. Such a result is contrary to both the language and purposes of CERCLA.

III. ALTERNATIVELY, IF ARC IS NOT ENTITLED TO RECOVER A PORTION OF ITS RESPONSE COSTS UNDER § 107(a)(4)(B), IT IS ENTITLED TO SEEK RECOVERY PURSUANT TO AN IMPLIED RIGHT OF CONTRIBUTION AFFORDED BY § 107(a)(4)(B).

In the event that ARC is somehow deemed a "compelled remediator," precluding its right to maintain a partial cost recovery action against the United States under § 107(a)(4)(B), ARC submits that, as the Court of Appeals held below, it has an implied right to seek contribution under CERCLA, a right left undisturbed by the enactment of SARA in 1986. Significantly, the government does not dispute the fact that the savings clause in § 113(f)(1) "preserves the ability of a PRP to bring an action for contribution, (as that term is traditionally defined) . . . ," apart from § 113(f). (Gov't. Cert. Pet., pp. 19-20.) However, the government maintains that this

retained right to seek contribution is defined in its "traditional" sense:

> Even if § 107(a) did contain an implied right to contribution, moreover, it would not help respondent, because § 107(a) would at most contain an implied right to 'contribution' in its 'traditional' sense, *i.e.*, a claim by one party to recover an amount from a jointly liable party *after the first party had extinguished a disproportionate share of their common liability to a third party.*

(Gov't. Br., p. 23) (emphasis added). Because there has been no discharge of all liability at the Camden site, *i.e.*, cleanup is ongoing, the government claims that ARC may not recover contribution because "traditional" contribution principles preclude recovery. (Gov't. Br., pp. 11-12, 21-26.) The government is wrong.

Prior to the enactment of SARA, courts unanimously held that compelled remediators had an implied right to seek contribution from other PRPs based upon the legislative history underlying CERCLA, as well as the language in § 107(a)(4)(B) and § 107(e)(2). These courts concluded that, as Congress had expressly indicated, the nature and scope of a PRP's contribution rights were to be developed by the courts as a matter of CERCLA common law; CERCLA's common law of contribution allowed compelled remediators to recover contribution from other PRPs for response costs incurred.

Significantly, there was *no* requirement under CERCLA's common law of contribution requiring the contribution plaintiff to have discharged all of the liability of the contribution defendant, as would be required under "traditional" common law contribution principles. The reason was obvious; because the cost required for a given

PRP to completely clean up a contaminated site is often monumental, if not unattainable, contribution under CERCLA did not require a complete cleanup or discharge of all common liability at the site. *See, e.g., Shore Realty, supra*, 648 F. Supp. at 262. Indeed, this fact is evidenced by the EPA's own view of CERCLA contribution, which is quoted by the government at p. 25 of its brief:

> [I]n a guidance document issued shortly before the enactment of the express contribution provision in Section 113(f) . . . [EPA emphasized] 'contribution among responsible parties is based on the principle that a jointly and severally liable party who has paid all or *a portion of a judgment or settlement* may be entitled to reimbursement from other jointly or severally liable parties.'

Citing 50 Fed. Reg. 5038 (1985) (emphasis added).[18]

This CERCLA common law contribution principle was confirmed and codified in § 113(f)(3)(B), providing that where a compelled remediator has settled its liability with the United States or a State, the PRP may recover contribution from another PRP "for some or all of a response action or for some or all of the costs of such action" – that is, *regardless of whether cleanup has been completed.* Moreover, EPA has consistently taken pains to state that PRPs who clean up sites may recover a portion of their costs before completing those cleanups because "requiring a party to incur all costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the

[18] Notably, contribution availability does not necessarily depend upon payment pursuant to a judgment or settlement, as the government claims, Gov't. Br., pp. 12, 25-26, but payment must be compelled. *See Centerior, supra*, 153 F.3d at 350-51.

intent of Congress that sites be cleaned up expeditiously." 55 Fed. Reg. 8666, 8798 (1990). Finally, the savings clause in § 113(f)(1) preserved not only traditional common law contribution claims that PRPs might have in the absence of a § 106 or § 107(a) action, but also those CERCLA common law contribution claims that existed prior to SARA, but were not asserted in or following a § 106 or § 107(a) civil action. As this Court observed in *Aviall*, 543 U.S. at 166-67:

> The sole function of [this] sentence is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1). In other words, the sentence rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP.

Accordingly, the enactment of SARA in 1986 did not withdraw the previously recognized right of compelled remediators to seek CERCLA contribution from other PRPs *if*, as here, the party seeking contribution had incurred response costs, even if those response costs did not result in a complete cleanup. However, if no response costs had been incurred, the only means of seeking contribution was via § 113(f)(1) or § 113(f)(3)(B), allowing the contribution claim to be maintained in the context of a § 106 or § 107(a) civil action, or after a settlement, regardless of whether the defendant PRP had incurred any response costs.[19] Each of these sources of contribution

[19] Pre-SARA courts, almost without exception, held that a PRP must have incurred response costs in order to seek contribution. *See Shore Realty, supra*, 648 F. Supp. at 261-62 (citing cases). Section 113(f)(1) permitted PRPs to assert contribution claims during or after

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rights are compatible and do not result in § 113(f) being superfluous. As the Court of Appeals held below:

> We must next ask whether, in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107. We conclude it did not. The plain text of § 113 reflects no intent to eliminate other rights to contribution; . . . This view is further supported by examining § 113's legislative history reflecting Congress's intention to clarify and confirm, not to supplant or extinguish, the existing right to contribution. . . . We conclude therefore that if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would have done so explicitly. Accordingly, we consider the plain language of CERCLA to be consistent with an implied right to contribution for parties such as Atlantic.

459 F.3d at 836.

Because ARC has incurred response costs, it is entitled to seek CERCLA contribution from the United States, even though site cleanup is on-going, a right implied from § 107(a)(4)(B) and § 107(e)(2), and preserved by SARA. Therefore, ARC is entitled to proceed with its partial cost recovery claim against the United States even if, *arguendo*, ARC were not entitled to maintain its § 107(a)(4)(B) direct cost recovery action as a voluntary remediator under CERCLA.

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§ 106 and § 107(a) civil actions even if no response costs had been incurred, thereby *expanding* the CERCLA common law right to seek contribution. Compare Rule 14, Fed. R. Civ. P.

CONCLUSION

For each of the above reasons, ARC respectfully submits that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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